



GP 0738

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Applicant(s): Dais et al.

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For: Cooling Container Having a  
Coolant and Pressure Relief Apparatus

Group Art Unit: 3738

Examiner: unknown

Certificate of Mailing

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September 10, 2002

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**SIXTH SUPPLEMENTAL  
INFORMATION DISCLOSURE STATEMENT**

Assistant Commissioner for Patents  
Washington, D.C. 20231

Sir:

The documents listed on the enclosed PTO Form-1449 are submitted pursuant to 37 CFR §§ 1.56, 1.97, and 1.98. Copies of the documents are enclosed as necessary.

Applicant further submits this Information Disclosure Statement to call to the attention of the Examiner certain research activities that the assignee of the above-identified application (hereinafter the "present assignee") conducted more than one year prior to the filing date of the present application. The activities discussed below were undertaken by employees of the present assignee with the assistance of a marketing research agency. The research activities involved the showing of first through fifth concept pages (items C4-C8) and the temporary distribution of first through third sample containers (items C9-C11) on a confidential basis to third parties.

In summary, while the concept pages (items C4-C8) and sample containers (C9-C11) relate to cooling containers in general, they do not disclose or suggest the invention as claimed in the present application nor render it obvious because none of such concept pages

(items C4-C8) or sample containers (items C9-C11) includes any type of pressure relief whatsoever.

However, if the concept pages and the sample containers were held to embody or render obvious the claimed invention (which they do not), it is contended that the research activity pertaining thereto qualifies as an experimental use.

Between June 8 and June 24, 1999, in numerous shopping malls across the United States, employees of the marketing research agency screened numerous individuals to determine whether such individuals would make appropriate participants for an interview relative to the first concept page (item C4). The several questions (hereinafter "screening questions") that were asked were intended to select participants meeting the following conditions: did not have family members or close friends employed in certain specified occupations (e.g., advertising, marketing, supermarket, manufacturer of household products); did not participate in a market research survey within the past three months; were at least 18 years of age; and did most of the grocery shopping for his/her household.

A total of 152 participants satisfied the above conditions and were shown the first concept page (item C4). These 152 participants were asked numerous questions (hereinafter "evaluative questions") such as: whether the participants liked or disliked the concept of a container capable of keeping food cold for several hours; the degree to which the participants liked or disliked the concept; and how much the participants would be willing to pay for such a container. After being asked these evaluative questions, the 152 participants were asked to sign a confidentiality agreement. Upon information and belief, each of the 152 participants signed such an agreement.

The second through fifth concept pages (items C5-C8) were not shown to the foregoing 152 participants, but were instead shown on the Internet to other participants. Internet participants were first selected by screening questions, substantially similar to the screening questions noted above. In addition, before viewing any of items C5-C8, the selected Internet participants were required to agree (electronically) to keep anything seen confidential. Internet participants who viewed the second through fifth concept pages (items C5-C8) were asked questions similar or identical to the above evaluative questions. In addition, at least some of the Internet participants received money (e.g., \$5) for their

participation.

Specifically, between January 10 and January 25, 2001, the second concept page (item C5) was shown on the Internet to 203 participants. Also during this period (January 10 - January 25, 2001), the third concept page (item C6) was shown on the Internet to 213 participants. (The third concept page (item C6), in addition to describing a container that keeps food cold, also introduced the concept of such a container incorporating a color-change feature.) Between February 7 and February 14, 2001, the fourth and fifth concept pages (items C7 and C8) were shown on the Internet to 213 participants. The fourth concept page (item C7) differs from the fifth (item C8) in terms of pricing information (i.e., in item C7 a single container is shown at \$4.99, while in item C8 two containers are shown offered at \$6.99). Upon information and belief, the 629 participants who saw the second through fifth concept pages (items C5-C8) were each paid \$5.

Of the 781 participants noted above, six groups were selected to receive sample containers identical to those shown in items C9-C11 on a confidential and temporary basis. (Each of items C9-C11 consists of a pair of digital photographs wherein each pair includes a perspective and a cross sectional view of each sample container.) Each of the six groups typically consisted of about nine participants. The participants of these groups were required to sign an additional confidentiality agreement prior to receiving a sample container. Upon information and belief, all participants signed such agreement. Also upon information and belief, each and every participant was paid anywhere from \$60-\$75. The participants of three of the six groups received containers on May 15, 2000, in Northfield, Illinois, while the participants of the other three groups received containers in Phoenix, Arizona, on May 16, 2000. Each participant was requested to take the container(s) home and to use the container(s) to store items. Approximately three to four weeks following the distribution of the sample containers, the sample containers were collected by the research agency retained by the present assignee, and the participants were interviewed to determine whether the sample containers performed in a fashion the participants found to be acceptable. Upon information and belief, all of the sample containers were collected from all of the approximately 50-odd participants. Some participants in the six groups noted cracking of the lid and leakage around the lid and suggested that the lid should be made sturdier and provide

better sealing. Participants also noted some dissatisfaction with the incompatibility of the sample containers with microwave usage. The research agency reported its findings and returned all of the sample containers to the present assignee.

A single public use, sale, or offer to sell involving the claimed invention, or involving a device reading upon every element of the claimed invention, before the critical date invalidates the patent under §102(b). *Atlantic Thermoplastics Co., Inc. v. Faytex Corporation*, 970 F.2d 834, 836 (Fed. Cir. 1992). "Public use" of a claimed invention under §102(b) has been defined as any use of the invention by a person other than the inventor who is under no limitation, restriction, or obligation of secrecy to the inventor. *Egbert v. Lipmann*, 104 U.S. 333, 336 (1881); *Tone Brothers, Inc. v. Sysco Corporation*, 28 F.3d 1192, 1200 n. 8 (Fed. Cir. 1994).

Experimental use is an exception to the 35 U.S.C. §102(b) "public use" bar. As stated by the U.S. Supreme Court, "The use of an invention by the inventor himself, or any other person under his direction, by way of experiment, and in order to bring the invention to perfection has never been regarded as such a [public] use." *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U.S. 126, 134 (1878). There may be an experimental use following a reduction to practice as long as the experiments are part of an attempt to further refine a device. *Poole v. Mossinghoff*, 214 U.S.P.Q. 506, 510 (D.D.C. 1982).

Experimental use applies where the totality of circumstances indicates that the dominant purpose of a disclosure was to determine efficacy of a device (e.g., how well the device works) and not to gauge consumer demand. *In re James A. Smith*, 714 F.2d 1127 (Fed. Cir. 1983). In determining the dominant purpose, a court may assess a number of factors including: the amount of control the inventor exercised over the testing; the length of the test period; whether any payment was made; whether there was a secrecy obligation; whether progress records were kept; whether someone other than the inventor conducted the experiments; and the degree of commercial exploitation during the tests in relation to the purpose of the experimentation. *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340, 1380 (Fed. Cir. 1998) (Bryson, J., dissenting in part); *Baker Oil Tools, Inc. v. Geo Vann, Inc.*, 828 F.2d 1558, 1564 (Fed. Cir. 1987).

Applying the facts to the law, it should first be evident that because the concept pages

(items C4-C8) and the sample containers that were distributed to the six groups (exemplified by the photos attached as items C9-C11) do not disclose or suggest any type of pressure relief apparatus, these concept pages and sample containers do not anticipate or render obvious the claimed invention.

Second, as discussed above, if the concept pages (items C4-C8) and the sample containers were held to embody the claimed invention, it is contended that the manner of sharing such concept pages and sample containers qualifies as an experimental use. In this regard, although the showing of the concept pages (items C4-C8) and the temporary distribution of sample containers involved questions related to pricing and consumer appeal, it is contended that the following factors favor experimental use: the participants were not asked for nor did they provide consideration for use of the sample containers; all sample containers were retrieved from the above-noted participants at the conclusion of the three to four week testing period; each participant was required to sign a confidentiality agreement prior to viewing the concept pages (items C4-C8); each participant who temporarily received one of the sample containers was required to sign an additional confidentiality agreement; the present assignee maintained records of the research activities; and the present assignee maintained considerable control over the activities by requiring confidentiality agreements, collecting the sample containers, asking for feedback from the participants, and paying the participants for their participation. In addition, a major purpose of the research activity was to determine the need for refinement of the sample containers, and participants, in fact, indicated a need for refinement of the sample containers (i.e., the present assignee learned of lid cracking and was also able to assess generally whether the sample containers were effective in maintaining products in a cold state.) Therefore, even in the unlikely event the concept pages and the samples containers were held to embody the claimed invention, the above factors combined all weigh in favor of experimental use sufficiently to preclude triggering the §102(b) bar.

Based on the foregoing, the showing of the concept pages (items C4-C8) and the showing and distribution of the sample containers do not preclude patentability of the claimed invention.

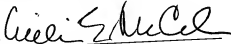
This information disclosure statement is being filed, to the best of the undersigned's

knowledge, before the mailing date of a first Office action. In accordance with 37 CFR §1.97(b), no certification or fee is required.

An early and favorable action on the merits is respectfully requested.

Respectfully submitted,

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